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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 90

CARLOTA BENITEZ SAMPAYO,

Petitioner

vs.

THE BANK OF NOVA SCOTIA.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT AND BRIEF IN SUPPORT THEREOF.

F. B. FORNARIS,
Ponce, P. R.,
Counsel for Petitioner.

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CARLOTA BENITEZ SAMPAYO,

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vs.

THE BANK OF NOVA SCOTIA.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your petitioner Carlota Benitez Sampayo, prays this Court for the issuance of a writ of certiorari to the United States Circuit Court of Appeals for the First Circuit, to review a final decision and decree of the said Appellate Court, affirming a decree of the District Court of the United States for Puerto Rico, entered on the 10th day of January, 1940 (109F (2) 743; R. 456) in connection with which final decision and decree a Petition for Rehearing was filed, which petition was denied on the 21st day of February, 1940 (R. 66).

Statement of the Matter Involved.

The opinion of the appellate court which forms part of the record (R. 53) deals with appeals No. 3486, 3487 and 3488, although the three appeals were never consolidated in the appellate court.

It was your petitioner's intention to file petitions for writs of certiorari to review each and every one of the decisions covered by said opinion but, due to her penury and other unsurmountable obstacles, it has been found necessary to file only a petition for writ of certiorari to review only the decision and decree which deals with appeal No. 3487, originating from your petitioner's farmer-debtor proceedings, initiated and maintained pursuant to the provisions of Section 75 of the Bankruptcy Act. (Section 203, Title 11, Bankruptcy, U. S. Code, as amended.)

Were this petition to be based exclusively on the elaborate opinion rendered on January 10, 1940, in connection with her said appeal No. 3487, your petitioner would feel constrained to enter into various phases of the situation which shall not be dealt with, it being that in the opinion of the court upon petition for rehearing (R. 66) it is definitely stated that in rendering the decision and decree which your petitioner seeks to review, the appellate court based itself solely on its interpretation to the effect that it was and is the definition of "farmer" inserted in Chapter 1, Section 1 (17) of the Chandler Act, entitled "Definitions" and not the definition of "farmer" appearing in Section 75, sub-section (r) of the Bankruptcy Act (49 Sat. 246) that applies in proceedings under said Section 75, after the effective date of the Chandler Act (52 Stat. 840).

Under the circumstances and in view of the fact that this petition and the brief which is to accompany it must be prepared and mailed to the Clerk of this Hon. Court within forty-eight hours, your petitioner shall limit the issue to the

question of legislative intent decided by the opinion pertaining to said appeal No. 3487 and such other questions as it may seem absolutely necessary to place before this court.

Reasons for Granting the Writ

1. It is respectfully submitted that the principal decision of the Circuit Court of Appeals to the effect that it was and is the definition of "farmer" inserted in Chapter 1, Section 1 (17) of the Chandler Act, entitled "Definitions" and not the definition of "farmer" appearing in Section 75, sub-section (r) of the Bankruptcy Act that applies in proceedings under said Section 75, after the effective date of the Chandler Act, is clearly erroneous, in conflict with the decision of another circuit court of appeals on the same matter, is probably untenable and in conflict with the weight of authority, while at the same time the question of Federal law decided is important and of general application and the matter should be settled for the country by this court. Your petitioner further respectfully submits that after said decision was rendered solely on the basis of interpretation of the legislative intent, the Congress of the United States has made its intent in the premises definitely known, through an amendment of the definition of "farmer" incorporated in said Section 75 (r), said expression of legislative intent being radically opposed to the letter and spirit of the decision which your petitioner seeks leave to review.

Your petitioner's contentions hereinbefore set forth are based, amongst others, on the following:

(a) "Section 75 (a) to (r) is unaffected by the Chandler Act, except as it is expressly amended by it." *Home Owners Loan Corporation* v. *Creed.* (C. C. A. 5th. Cir., 1939), — P. 2d., — not yet reported. Citation obtained from the January 5, 1940 Current Matter Section of Prentice-Hall

Bankruptcy Service, p. 8527 under the title "Creditors and liens amenable to Section 75 (a) to (r)."

(b) The 1938 edition of the United States Code (11 U. S. C. Section 203 (r) as pointed out by the appellate court on page 12 of the printed Opinion, shows Section 75 (r) as unaffected by the Chandler Act. The U. S. Code expressly provides that its contents are prima facie the law.

(c) Reference to the official printed report of hearings had on November 23, 1937, January 19, 21, 25 and February 15, 1938, before a subcommittee of the Judiciary, United States Senate, Seventy-fifth Congress, Second Session on H. R. 8046 (which resulted in the promulgation of the Chandler Act) will show that the Hon. Walter Chandler, in his statement to the U. S. Senate, relative to what "the House Committee did with reference to this legislation" (p. 1) after having pointed out that some new definitions had been added (p. 3) made the following statement:

> "In addition to those original 70 sections you will remember that the former bankruptcy or moratorium act, known as the Frazier-Lemke Act, which was known as section 75, was passed in 1933 or 1934. *We did not touch that section, and it is not affected by this act.*" (p. 5).

(d) Examination of the official printed report of the hearings had on December 17 and 18, 1937 and January 5, 6 and 7, 1938 before the Special Sub-Committee on Bankruptcy of the Committee on the Judiciary, Seventy-fifth Congress, second and third sessions on S. 2215 and H. R. 6452 will develop the fact that around the same time that Congress, through its Committee and Sub-Committee on the Judiciary was discussing the legislation which eventually resulted in the promulgation of the Chandler Act, was also holding separate hearings on other separate legislation, pertaining to Section 75 of the Bankruptcy Act, the Hon. William Chand-

ler presiding (pp. 1, 53). One of the proposed amendments to said Section aimed at making Section 75 of the Bankruptcy Act permanent (pp. 181, 193) like the other provisions of the Bankruptcy Act which were being *separately* rewritten and revised, in the form of permanent legislation. Report No. 1833 submitted by the Hon. Walter Chandler on February 18, 1938, to accompany S. 2215 (75th Congress, 3rd Session) shows that the Hose Committee on the Judiciary after considering the Farm Moratorium Law "determined, after extensive hearings and thorough investigations, that the act, in its present form, should not be made a permanent part of the Bankruptcy law, and approves S. 2215 only for the purpose of extending the statute for 2 years from March 3, 1938. DURING THE EXTENDED TERM, IF IT APPEARS THAT SECTION 75 SHOULD BE MADE PERMANENT, *APPROPRIATE CHANGES IN THE LAW CAN BE MADE.*" (p. 2, underscoring and capitals supplied.)

Your petitioner respectfully represents to the Court that Public Law, No. 439, 75th Congress, Chapter 41, 3rd Session, approved March 4, 1938 and which was the outcome of Report No. 1833, hereinbefore referred to on S. 2215, and through which it was decided that "the Act" (Section 75) the way it stood, should not be amended immediately, is the one that rewrote sub-section (c) of Section 75. The Chandler Act having been approved shortly thereafter, i. e., June 22, 1938 it is evident that the "farmer" referred to in said sub-section (c) of Section 75 was intended to be the one defined in Section 75 (r) as it was in force on the date of such amendment, namely, March 4, 1938 and not the "farmer" in a definition incorporated more than three months thereafter in Section 1 (17) of the Chandler Act, which Act, as stated by the Hon. Walter Chandler, *did not touch that Section (Section 75) which was NOT AFFECTED by said Chandler Act.* (See (c) hereinabove.)

(e) In the case of procedings for the erlief of debtors which were incorporated in the Chandler Act in the form of permanent legislation, it was definitely provided that the provisions of the original Bankruptcy Act, as amended through the Chandler Act (Chapters I to VII, inclusive) insofar as they were not inconsistent or in conflict with the provisions of the particualr chapter, apply in procedings under the said chapter and that for the purposes of such application, provisions relating to "bankrupts" shall relate also to "debtors," etc. (Chapter X, Sec. 102; Chapter XI, Sec. 302; Chapter XII, Sec. 402; Chapter XIII, Sec. 302.) No such provision was incorporated in the Chandler Act in connection with Section 75 of the Bankruptcy Act. Consequently, and following the well established rule to the effect that what includes one, excludes the other, it follows that it was not intended by Congress to have said provisions of Chapters I to VII apply in the case of debtors availing themselves of the relief made available to them by Section 75 of the Bankruptcy Act, except as provided in said Section. This view is sustained by the construction of the particular Federal statute made through the decision cited under paragraph (a) hereinabove, which construction would not seem to be erroneous, in view of what has been hereinabove set forth.

(f) The General Orders in Bankruptcy amended and established by this court on January 16, 1939 released January 27, 1939 and effective February 13, 1939 include General Order 50 which in its pertinent part reads as follows:

> (9) * * * "The petition shall show to the satisfaction of the district court that the decedent at the time of his death *was a farmer within the meaning of subdivision (r) of Section 75* * * *" (not of Section 1 (17) of the Chandler Act.) (Underscoring supplied.)

Your petitioner respectfully submits that although said portion of sub-division (9) of New General Order 50 refers to the filing of a petition under Section 75 by the representative of a deceased farmer, the phrase cited is nevertheless conclusive to the extent of indicating that, in the opinion of this court it is sub-section (r) of Section 75 and not Section 1 (17) of the Chandler Act that governs the definition of a "farmer" in proceedings under Section 75. The fact that New General Order 50 was established on January 16, 1939, that is, almost seven months after the Chandler Act was approved (June 22, 1938) eliminates any doubt as to whether it was intended or not to have said definition of "farmer" continue in effect after the effective date of the Chandler Act (September 22, 1938.)

(g) Through the Order of January 16, 1939 hereinbefore referred to, this court also amends and establishes Forms in Bankruptcy. Form No. 63 established through said Order, entitled "Debtor's Petition in Proceedings under Section 75 of the Bankruptcy Act" follows the definition of "farmer" embodied in subsection 75 (r) and expressly includes as one of the alternative jurisdictional qualifications the phrase "*or* the principal part of whose income is derived from one or more of the foregoing operations" just as it appeared in old form 65. The word "or" has not been substituted for the word "if" as is the case with the definition in Section 1 (17).

(h) The opinion rendered in the case of *In re Horner* (*Horner* v. *Second Nat. Bank of Beloit, Wis.* (C. A. A. 7th. Cir., 1939), 104 F. (2d) 600 your petitioner respectfully submits, further confirms the concensus of opinion to the effect that it is the definition of "farmer" appearing in sub-section (r) of Section 75 and not the one incorporated in Section 1 (17) of the Chandler Act that governs in pro-

ceedings under said Section 75, even after the effective date of said Act.

(i) Through the promulgation of the Act designated as Public — No. 423— 76th. Congress—Chapter 39— 3d. Session (S. 1935) approved March 4, 1940, the Congress of the United States manifested the legislative intent as to this question. Said expression of intent is definitely contrary to that attributed to Congress by the appellate court. While the interpretation of the legislative intent arrived at by the appellate court is based upon the premises that the definition of "farmer" inserted in Chapter 1, Section 1 (17) of the Chandler Act, was intended to apply to Section 4 (b) of the Bankruptcy Act; that were the definition of "farmer" incorporated in sub-section (r) of Section 75 to be considered as part of the context of sub-sections (c) and (s) of said Section, it must be equally considered as part of 4 (b) and old Section 74; that there could not exist an intention on the part of Congress "to reintroduce the awkward situation of having "farmer" mean one thing in Section 4 (b) and something else in Section 75"; that the definition of farmer which is presumed to apply to Section 4 (b) "necessarily amends Section 75 (r)" and that "the Chandler Act amendment of Section 1 (17) by implication repeals Section 75 (r) so far as the old definition of 'farmer' is inconsistent with the new", Congress, through the promulgation of the Act cited at the beginning of this paragraph (i) establishes that Section 75 (r) has continued to apply to Section 4 (b), having simply eliminated through said legislation the reference to Section 74 (no longer in force) so that the "awkward situation" referred to, does not, in fact exist and that it is the definition in Section 75 (r) and not that in Section 1 (17) that applies to Section 4 (b) and Section 75 of the Bankruptcy Act. Careful comparison of the last definition of "farmer" incorporated in

the Bankruptcy Act through the Act of May 15, 1935, 49 Stat. 246 (which the opinion designates as "the old definition") with the definition as it now stands through the promulgation of the Act cited at the beginning of this paragraph (i) will disclose the ominous fact that both definitions are one and the same, with the only exception that in the case of the last mentioned one, the word "and" has been placed before the word "section 4 (b)" and the words "and Section 74" have been omitted. Obviously, through the promulgation of that latter legislation, Congress has definitely manifested its true legislative intent in no indefinite way and contrary to the intent attributed to it by the appellate court.

Prentice-Hall Bankruptcy Service, in its Report Number 19, dated March 21, 1940, at the beginning of the sheet designated as "Executive Sheet", attached to said Report, and under the caption "Matters of Special Interest" states the following with reference to the Act referred to at the beginning of this paragraph (i):

> *"Life of Section 75 Extended."*
>
> "Act of March 4, 1940 extends to March 4, 1944, time within which petition under Section 75 may be filed. *It also removes from subsection (r) reference to Section 74, no longer in Bankruptcy Act.* Reprinted pages *to reflect these changes* are contained in this report." (Underscoring supplied.)

(j) The question of federal law decided is important and of general application in that not only has the appellate court erroneously established jurisprudence to the effect that subsection (r) is no longer in full force and effect as regards proceedings initiated under Section 75, but also that the definition of "farmer" therein contained does not apply to proceedings under the general bankruptcy Act.

It is therefore, respectfully submitted that the matter should be settled for the country by this court.

Should the decision which your petitioner aims to have reviewed be permitted to stand, the rights of many farmers who now or later on may find themselves involved in bankruptcy proceedings, as well as those of their creditors, might be seriously jeopardized and adversely and fatally affected.

The principal difference between the definition of "farmer" as it appears in Section 75 (r) and that contained in Section 1 (17) of the Chandler Act consists in that while in the former case a person may usually qualify as a "farmer" by establishing that his principal income is derived from one or more of the "foregoing operations" in the case of the latter, such person, besides qualifying as a farmer, must have also received his principal income from farming operations. This condition of affairs if permitted to continue for any length of time, would obviously hinder and delay the financial rehabilitation of many an honest farmer or even bring financial disaster and ruin to many persons who could otherwise rehabilitate themselves through orderly liquidation and might even result in placing the stigma of bankruptcy on farmers who are not amenable to involuntary banpruptcy proceedings, under a proper interpretation of the law for the case made and provided.

This court has previously established the premise that a bankrupt is a financial wreck and that the question of interest as well as others must be considered in that light.

Still, if the decision which your petitioner seeks to review were permitted to stand, the most inveterate and conspicuous farmer in this country would be amenable to involuntary bankruptcy proceedings, as soon as through some misfortune, he ceased to receive his principal income from one or more of the farming operations specifically listed in

said Section 1 (17) of the Chandler Act. Such interpretation would be contrary to the theory enunciated by this court in the Beach case (*First National Bank* v. *Beach*, 301 U. S. 435 (1937)) when it stated "One does not cease to be a farmer because drought or wind or pest may have rendered the farm barren."

The precise form and manner in which this erroneous decision adversely affects your petitioner shall be shown in propounding some of the other questions which it is aimed to review through this petition.

2. Your petitioner respectfully submits that the question of legislative intent having been erroneously decided, as hereinbefore set forth, and your petitioner qualifying as a farmer under Section 75 (r) (as shall be hereinafter shown) the appellate court should have declared all legal proceedings initiated or maintained after the filing of the petition under Section 75 and, in particular, the proceedings had thereafter in Equity Suit No. 2151 then pending before the District Court of the United States for Puerto Rico (including the sale at auction of your petitioner's property and assets, and the confirmation thereof) to be null and void and of no legal consequence, pursuant to the mandatory and self-executing stay provisions of sub-sections (o) and (p) of said Section 75. This point requires no argument since same was decided by this court on January 2, 1940, in line with your petitioner's contentions, in the cases entitled *Kalb et al.* v. *Feuerstein et al.* and *Kalb* v. *Luce et al.*, which cases bear Nos. 120, 121, before this court.

3. On page 8 of said printed Opinion it is stated that "In addition to her interest in the farming operations of the Comunidad, appellant based her claim to be a 'Farmer' on the fact that at her home in the City of Ponce, where she lives with her husband, she has for several years engaged in a small way in raising and selling poultry

and eggs, from which she derives a profit of about $50.00 a month." ($600.00 per year.)

Your petitioner respectfully represents to the Court that there is no proof in the record on appeal herein to the effect that she has for several years engaged in raising and selling poultry and eggs *"at her home in the City of Ponce, P. R."* On the contrary, the record shows that your petitioner went into the business of raising chickens while residing at a *farm* leased by her in the outskirts of the town of Guaynabo, P. R., and that it was only after said chickens had developed into grown birds, that the birds were transferred from the farm at Guaynabo, to this city of Ponce.

Your petitioner further, respectfully, represents to the Honorable Court that, when viewed in the light of the limitations to which poultry business is necessarily subjected to in Puerto Rico, due to the small size of the island and of its urban population consuming high grade poultry products, as well as to various other reasons, a poultry business consisting of 110 chickens and several hundred pigeons (Findings of Fact—R. 21) may not be classed as a small business or as a business handled in a small way. This is specially so in view of the fact that, as stated in the Opinion, said business produced a profit of $50.00 per month or $600.00 per year.

Your petitioner alleges that in all probability the Appellate Court overlooked the fact that utility pigeons also fall within the category of poultry as held by the learned District Judge. (Findings of Fact, end of second paragraph thereof, R. 21.)

Your petitioner further respectfully represents to the Honorable Court that in the case of the *First National Bank* v. *Beach*, 301 U. S. 435, where debtor, appellee Beach, "was occupied *principally* in raising poultry and eggs, having two hundred chickens in 1933, *and about fifty from 1935 to the time of the trial* (second paragraph of the opinion de-

livered by Mr. Chief Justice Cardozo) this court affirmed the decision, thus establishing the precedent to the effect that a person owning about fifty chickens and deriving $200.00 per year from the sale of poultry and eggs, was primarily engaged in the production of poultry and poultry products in their unmanufactured state. Italics and parenthesis supplied.)

4. The first full paragraph appearing on page 8 of said printed Opinion, would seem to indicate that the appellate court failed to take into consideration the fact that Schedule A-3 shows a personal debt owed by your petitioner to E. Arjona Siaca, Esq., (who approved her proposal) in the sum of $300.00 "for legal fees in connection with work performed for petitioner *in the insular courts* and other legal services rendered to date," and that your petitioner showed an item of $1,780.00 due and owing to her by Mrs. Adela Rosaly Capo viuda de Seix.

Your petitioner further respectfully represents to the Court that although she seasonably prayed for leave to file amended schedules, in order to include in same certain other assets aand liabilities inadvertently omitted, including a claim against Respondent, The Bank of Nova Scotia in Equity Suit No. 2350 said leave was denied. (R. 27, docket entries of December 10 and 19, 1938.)

5. In the case of *First National Bank* v. *Beach*, cited on page 13 of the printed Opinion to which this petition refers, Mr. Chief Justice Cardozo, who delivered the opinion of this Court, said:

> "Was respondent a farmer because 'personally bona fide engaged primarily in farming operations' or because 'the principal part of his income was derived from farming operation.'?"
>
> "We do not try to fix the meaning of either of the two branches of this definition, considered in the ab-

stract. The two are not equivalents. They were used by way of contrast."

"The words 'primarily engaged', as we find them in the first branch of the definition, do not constitute a term of art. The words 'income derived from farming operations' do not constitute such a term."

Your petitioner respectfully submits to the Court that, irrespective of any other jurisdictional qualifications, the record of the above entitled cause conclusively establishes that she is a "farmer" pursuant to the provisions of Section 75, because the principal part of her income was derived from one or more of the farming operations listed in Section 75 (r), at the time of the initiation of her farmer-debtor proceedings to which this petition refers and for quite some time prior to the filing of her petition under Section 75 of the Bankruptcy Act.

6. On page 13 of the printed opinion the appellate court states: "We think the District Court was right in concluding that Debtor was not 'personally engaged' in the farming operations of the Comunidad on Vieques Island. She was a party to the Community *contract* which designated her father as general manager, but she was a housewife living with her husband in the city of Ponce, P. R., and had no personal participation in the farming operations of the Comunidad." (Italics supplied.)

Your petitioner respectfully submits the following, in connection with those portions of the Opinion hereinbefore transcribed:

The contract referred to expired since the month of July 1935 (R. 233) and was never extended or renewed after that date. (R. 233). Consequently, the status thereafter was that of a state of indivision in a hereditary joint proprietorship ("Comunidad") or "Sucesion."

The case of In re *Wright's Estate*, 17 F. Supp. 908, establishes that operation through a manager does not cause

such operation to cease to be the farmer-debtor's operation to be her own operation, if it was for her benefit and she furnished the means of carrying it on, which your petitioner did, through the loans made to the manager *de facto* and later on to the Receiver, which were charged proportionately to her.

The letter addressed by your petitioner and others to the Bank of Nova Scotia on February 19, 1937 shows that even at that prior date your petitioner was considered as one of the "*Successors* to Comunidad Jose J. Benitez e Hijos." Said letter was offered in evidence by said Bank at the trial of Equity Suit 2151 and identified as exhibit 67 for complainant. The negotiations carried into execution through that letter were subsequently approved and confirmed by the District Court, through its Decree of August 22, 1938 (See Finding of Fact XXVII, forming part of said Decree). Consequently, the District Court also confirmed your petitioners' status as one of the successors to the defunct Comunidad and as a "farmer-producer", as defined in the Agricultural Adjustment Act and Jones-Costigan Act, under which the benefit payments involved accrued to your petitioner as such "farmer producer".

7. On page 13 of the printed Opinion the following statement appears:

"She professed to know only from heresay that the properties had been operated by The Bank of Nova Scotia from 1933 to the filing of the equity suit."

Your petitioner respectfully represents that she answered "so they say" when questioned as to such alleged possession, in a sarcastic mood, but that such answer could hardly be interpreted in the sense that she knew it from hearsay, or admitted such alleged possession, in view of her immediate subsequent statement to the effect that she knew that it was her father who was managing the business for the last few years.

Your petitioner further respectfully represents to the Court that as regards the advance benefit payments at the rate of 60 cents per ton of sugar cane (See testimony over the subject produced by Mr. A. E. Griffin, Manager of The Bank of Nova Scotia, she could not have qualified for said payment unless she qualified as "producer" as stipulated in section 10 (a) of the Puerto Rico Sugar Cane Production Adjustment Contract. It was only in the case of the "final payment" (See par. 19 (b) of said contract) that payment might be also effected to a crop lienholder, as per section 23 of said contract. It was for that reason that two separate checks were issued. The check for $10,151.40, covered the advance benefit payment and the one for $91,201.80 covered the final payment. The name of The Bank of Nova Scotia was not included as payee in the check for $10,151.40 covering the advance payment because, unlike your petitioner, said Bank was not a "farmer-producer". Said Bank's name was included as payee in the check for $91,-201.80 as an alleged crop lienholder, which alleged status your petitioner challenged before the U. S. Secretary of Agriculture, whose failure to decide the issue eventually forced your petitioner into an unfavorable compromise.

8. The following has been extracted from pages 13 and 14 of the printed Opinion:

> "We think also, that the debtor was not shown to be a 'farmer' by virtue of her poultry business. Assuming that a housewife's raising of a few chickens in the back yard of a city home is the 'production of poultry' within the meaning of the definition (cf. In re McMurray, 8 F. Supp. 449, 454), the debtor will not qualify under this category unless the principal part of her income is derived from this poultry business. Whether the clause 'if the principal part of his income is derived from any one or more of such operations' modified 'an individual personally engaged in farming or tilling of the soil' need not now be decided; it certainly modifies

the clause immediately preceding it, referring to 'an individual personally engaged * * * in the production of poultry * * *.' The debtor testified that she received $50 a month from the poultry business. In 1937 she received $20,000 as her share of benefit payments by the Department of Agriculture on account of the 1935 sugar crop of the Comunidad, and she claims that other substantial sums (amounts not indicated) are due her as profits from this 'integrated enterprise', as would appear upon and accounting. As previously stated, the profits of the enterprise, since 1933, have been devoted to the payment of debts for which the Comunidad and its members, including appellant, were liable. On this record the debtor failed to establish, indeed made no effort to establish, that the principal part of her income was derived from the production of poultry; hence the District Court was not in error in its ultimate conclusion that 'This Court as a bankruptcy court is without jurisdiction to entertain the debtor's petition filed herein.' "

For brevity's sake, your petitioner incorporates by referance at this point the statements appearing in paragraph 3 hereinabove, which statements, your petitioner respectfully submits, overcome the presumption to the effect that your petitioner was a housewife raising a few chickens *in the backyard of a city home* and besides establish that she was also engaged primarily in the production of poultry, within the meaning of Section 75 (r).

The following has been extracted from Note 2, appearing on page 5065 of the Prentice-Hall Bankruptcy Service, latest edition:

"The proceeding may be instituted only by the farmer himself; but the term 'farmer', as used in Section 75, means 'any individual who is personally bona fide engaged primarily in farming operations, *or the principal part of whose income is derived from farming operations* and includes the personal representative of a deceased farmer' (Underscoring supplied.)"

Your petitioner further respectfully submits that such part of the opinion as has been cited under this number is contrary to the pertinent holdings of this court in the Beach case. (*First National Bank* v. *Beach* 300 U. S. 435 1937) also contrary to *In re Horner* (C. C. A. 7th 164 F. (2d) 600).

In the case of *In re Horner* (*Horner* v. *Second Nat. Bank of Beloit, Wis.*) (C. C. A. 7th. Cir. 1939, 104 F. (2d) 600) the Circuit Court said:

> • • • "but in the instant case it is agreed that debtor derived *the principal part of his income from the production of plants.*" (Not mentioned in the second part of the definition of "farmer" incorporated in Section 75 (r) through the amendment promulgated by the Act of May 15, 1935, 49 Stat. 246.)
>
> "We concluded that the undisputed facts disclosed that, *for the purpose of section* 75 (*r*), the debtor was 'primarily bona fide personally engaged in producing products of the soil *and that the principal part of his income was derived therefrom.* The trial court erred in its holding that debtor was not entitled to the privilege and benefits of the act."

9. The appellate court was probably wrong in refusing to reverse the decision of the district court to the effect that your petitioner is not a "farmer", pursuant to the provisions of Section 75 (r) of the Bankruptcy Act, for the following reasons:

(a) The record shows that your petitioner is a "farmer" since she was engaged in the production of poultry and poultry products in their unmanufactured state and on a business or commercial scale for some years prior and up to the initiation of the farmer-debtor proceedings to which this petition refers.

(b) The record further shows that your petitioner also qualified as a farmer because of the agricultural enterprise in which she has been engaged in the Island of Vieques,

P. R. since the year 1917 and continuously until after the filing her petition praying for relief under Section 75 of the Bankruptcy Act.

(c) The principal part of the income (in fact, all the income) received by your petitioner up to the time of the initiation of her said farmer-debtor proceedings originated from one or more agricultural operations specifically listed in Section 75 (r), as found by the appellate court.

(d) For all the other reasons hereinbefore set forth.

10. The appellate court was probably wrong in refusing to reverse the decision and decree challenged by your petitioner since issue was never legally joined in the district court on the question as to whether your petitioner was or was not a farmer, for the following reasons:

(a) The motion for dismissal which resulted in the decree of dismissal complained of, affirmed by the appellate court, was never verified under oath, (R. 8) although the issue as to lack of verification was seasonably raised by your petitioner in her answer. (R. 11.)

(b) Such procedure, once the issue was seasonably raised, contravenes the express provisions of Section 18 (c) of the Bankruptcy Act, as seasonably alleged by your petitioner in her answer (R. 12).

(c) The issue raised by the said Motion for Dismissal, which resulted in the Decree of Dismissal complained of affirmed by the appellate court, not appearing from the record of the proceedings, such issues could not be raised through motion or petition, said procedure being altogether inadequate and contrary to law.

11. The appellate court was probably wrong in refusing to reverse that part of the decision and decree of the district court which holds that your petitioner has no debts other

than those that may possibly arise by virtue of her secondary liability as a member of the defunct "Comunidad" since the record shows that your petitioner actually had certain debts not having any connection whatsoever with the affairs of the so-called "Comunidad" and that her alleged liability as a member of the "Comunidad" was not claimed and held to be secondary, but primary, to the extent that your petitioner has been deprived of her total interest in the agricultural enterprise in Vieques, of which she is a co-proprietor ("condomine" or "comunera" under our law) worth several hundred thousand Dollars, on the basis of action filed directly against your petitioner and the other co-proprietors and not against the defunct "Comunidad".

12. The appellate court was probably wrong in refusing to reverse that part of the decision and decree of the district court which holds that it was without jurisdiction to entertain your petitioner's said farmer-debtor proceedings, since such conclusion is contrary to law and to the facts of the case.

13. The appellate court was probably wrong in refusing to reverse that part of the decision and decree of the district court which requires your petitioner to pay costs since when a petition is dismissed exclusively on jurisdictional grounds, the court may not decree costs.

Wherefore, it is respectfully requested that this petition for a writ of certiorari be granted, and that the final decision and decree of the Circuit Court of Appeals for the First Circuit to which this petition refers, may be reversed by this Hon. Court.

And that your petitioner may have such other and further relief as may seem meet and proper,

Your petitioner will ever pray.

Ponce, Puerto Rico, May 18th, 1940.

F. B. FORNARIS, *Counsel for Petitioner.*

UNITED STATES OF AMERICA,
Territory of Puerto Rico,
City of Ponce, ss:

I, Carlota Benitez Sampayo, being duly sworn, upon my oath depose and say: That I am of legal age, married, a farmer and a resident of Ponce, P. R. and the petitioner in the above entitled cause. That the foregoing petition has been prepared in accordance with my instructions and I have read same and that the facts stated therein are true to the best of my knowledge, information and belief.

CARLOTA BENITEZ SAMPAYO,
Petitioner, Affiant.

Affidavit No. 410.

Subscribed and sworn to before me by Carlota Benitez Sampayo of the personal circumstances hereinbefore set forth and to personally known, at Ponce, P. R. on this 18th, day of May, A. D. 1940.

GUILLERMO VIVAS ROSALY,
Notary Public.

BRIEF AND ARGUMENT IN SUPPORT OF PETITION.

Opinions Below.

The decision of the Circuit Court of Appeals having been limited in its scope to the affirmance of the decree of the District Court on jurisdictional grounds, the principal issues in the case as they are indicated under "Reasons for Granting the Writ" do not require an analysis or a lengthy discussion of the terms thereof.

As far as your petitioner has been able to ascertain, the opinion in the District Court was never printed or reported. That of the Circuit Court of Appeals, dated January 10, 1940, has been reported as *Benitez* v. *Bank of Nova Scotia* (C. C. A. 1st Cir., 1940) in 109 F. (2d) 743. Your petitioner is under the impression that the printed opinion upon petition for rehearing (R. 66) in which appellate court states that its previous decision was based exclusively upon the question of legislative intent referred to at length in the petition to which this brief refers, has not as yet been reported.

Jurisdiction.

The jurisdiction of this Court is invoked under subsection (n) of Section 75 and Section 24 (c) of the Bankruptcy Act (Sec. 203, Title 11, Bankruptcy, U. S. Code, as amended) and Section 240 of the Judicial Code of the United States, as amended by the Act of February 13, 1925 (Section 347, Title 28 U. S. C. A.).

The Facts.

The facts pertinently to be considered are fully set forth in the petition.

Specifications of Errors.

The errors upon which your petitioner relies and which it is intended to urge, are indicated in the petition to which this brief refers, under "Reasons for Granting the Writ."

Principal Question Presented.

1.

The decision and decree of the Circuit Court of Appeals to the effect that it is the definition of "farmer" inserted in Chapter 1, Section 1 (17) of the Chandler Act (52 Stat. 840), entitled "definitions" and not the definition of "farmer" found in subsection (r) of Section 75 of the Bankruptcy Act (49 Stat. 246) that applies in proceedings under said Section 75, after the effective date of said Chandler Act, is clearly erroneous, in conflict with the decision of another Circuit Court of Appeals on the same matter, is probably untenable and in conflict with the weight of authority. Besides, said decision interprets the legislative intent in a manner which is directly opposed to the intent ratified by the Congress of the United States at a later date.

Your petitioner having set forth in detail in the petition to which this brief refers the grounds on which she bases the contentions hereinabove set forth, begs leave to reproduce by reference at this point paragraph 1 of her petition appearing on pages 3 to 11 thereof under "Reasons for Granting the Writ."

The definition of "farmer" appearing in subsection (r) of Section 75, when your petitioner initiated her farmer-debtor porceedings under said section, read as follows:

> "For the purpose of this section 4 (b) and section 74, the term 'farmer' includes not only an individual who is primarily bona fide personally engaged in producing products of the soil, but also any individual who is primarily bona fide personally engaged in dairy farming, the production of poultry or livestock, or the production of poultry products or livestock products in their unmanufactured state, *or* the principal part of whose income is derived from any one or more of the foregoing operations, and includes the personal representative of a deceased farmer; and a farmer shall be deemed a resi-

dent of any county in which such operation occur." (Underscoring supplied.)

The definition of "farmer" inserted in Chapter 1, Section 1 (17) of the Chandler Act which the Circuit Court of Appeals has held to apply on proceedings instituted under Section 75 of the Bankruptcy Act, after the Chandler Act became operative and that it "necessarily amends section 75 (r)," reads as follows:

> "(17) 'Farmer' shall mean an individual personally engaged in farming or tillage of the soil, and shall include an individual personally engaged in dairy farming or in the production of poultry, livestock, or poultry or livestock products in their unmanufactured state, *if* the principal part of his income is derived from any one or more of such operations." (Underscoring supplied.)

Public—No. 423, 76th Congress, Chapter 39, 3d Session (S. 1935) which your petitioner contends to represent a decided reassertion of the legislative intent, contrary to the decision complained of, reads as follows:

> "An Act to extend until March 4, 1944, the time during which petitions may be filed by farmers under section 75 of the Bankruptcy Act.
>
> "Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section 75 (c) of the Act entitled 'An Act to establish a uniform system of bankruptcy throughout the United States,' approved July 1, 1898, as amended, is amended to read as follows:
>
> "(c) At any time prior to March 4, 1944, a petition may be filed by any farmer, stating that the farmer is insolvent or unable to meet his debts as they mature, and that it is desirable to effect a composition or an extension of time to pay his debts. The petition or answer of the farmer shall be accompanied by his schedules. The petition and answer shall be filed with the court, but shall, on request of the farmer or creditor, be received by the conciliation commissioner for the county in which

the farmer resides and promptly transmitted by him to the clerk of the court for filing. If any such petition is filed, an order of adjudication shall not be entered except as provided hereinafter in this section."

Sec. 2. Section 75 (r) of such Act is amended to read as follows: "(r) For the purposes of this section and *section 4 (b)* the term 'farmer' includes not only an individual who is primarily bona fide personally engaged in producing products of the soil, but also any individual who is primarily bona fide personally engaged in dairy farming the production of poultry or livestock, or the production of poultry products or livestock products in their unmanufactured state, or the principal part of whose income is derived from any one or more of the foregoing operations, and includes the personal representative of a deceased farmer; and a farmer shall be deemed a resident of any county in which such operations occur.

Approved March 4, 1940.

Were the decision of the Circuit Court of Appeals to the effect that it is Section 1 (17) of the Chandler Act and not subsection (r) of Section 75 that applies in proceedings instituted under said Section 75, and under the General Bankruptcy Act, permitted to stand, the definition of "farmer" ratified by Congress through the Act of March 4, 1940 hereinabove transcribed would be affected in the following fundamental aspects:

(a) Said definition of "farmer" of Section 1 (17) would be the one to apply in proceedings initiated under Section 4 (b) and 75 of the Bankruptcy Act, instead of the definition of subsection (r) of said Section 75, as ratified by Congress through said Act of March 4, 1940. Still, Section 1 of Chapter 1 of the Bankruptcy Act, entitled "Definitions" expressly states at the beginning thereof that the words and phrases dealt with (including the definition of "farmer" in Section 1 (17) shall be construed as specified, "*unless the*

same be inconsistent with the context." Obviously, in the light of the ratification of legislative intent promoted through said Act of March 4, 1940 hereinabove transcribed, the definition of "farmer" in subsection (r) of Section 75, is part of the context of subsections (c) and (s) of said Section and of the context of Section 4 (b) of the Bankruptcy Act. (Underscoring supplied.)

(b) In order to qualify as a "farmer", a person would not have to be *primarily, bona fide* personally engaged *in producing products of the soil, etc.,* but would simply have to be *personally* engaged in *farming or tillage of the soil* or in any of the operations listed, provided the principal part of his income were derived "from any one or more of the foregoing operations". This would certainly open the way for unscrupulous persons to qualify as "farmers", contrary to the legislative intent. For instance, a person not a bona fide farmer could nevertheless, by leasing a farm which produced the necessary income and engaging personally in its operation either avoid becoming amenable to involuntary bankruptcy proceedings or else take advantage of the relief provided exclusively for *bona fide farmers* by Section 75 of the Bankruptcy Act.

(c) It would bar proceedings under Section 75 of the Bankruptcy Act to a person who derived the principal part of his income "from any one or more of the foregoing operations, contrary to the opinion of *First National Bank* v. *Beach* 301 U. S. 435 (1937) as reproduced on page 15 of the petition to which this brief refers, to the effect that the two branches of the definition of "farmer" in subsection (r) of Section 75 "are not equivalents" but, on the contrary "were used by way of contrast" and that neither of the said two branches "constitute a term of art."

As already established on page 10 of the petition to which this brief refers, the Act of March 4, 1940, hereinbefore

transcribed, simply aimed at removing from the definition of "farmer" in subsection (r) of Section 75 the reference to Section 74, for the simple reason that, as stated by Prentice-Hall Bankruptcy Service (see citation on page 10 of the petition) it is "no longer in the Bankruptcy Act." After the promulgation of said Act of March 4, 1940 which, as regards Section 75 (r) (with the exception of eliminating the words "and Section 74" and adding the word "and" between "this section" and "section 4 (b)" in order to effect the purpose of eliminating all reference to Section 74) is a word by word repetition of said Section 75 (r) as it stood prior to the promulgation of the Chandler Act, there can be no doubt but that it was never the intention of Congress to create an impression to the effect that, as stated in the opinion, "the Chandler Act amendment of Section 1 (17) by implication repeals Section 75 (r), so far as the old definition of "farmer" is inconsistent with the new or that "the applicable definition is found in the new Section 1 (17)", specially so as regards proceedings initiated under Section 75, which must be necessarily governed by the definition of Section 75 (r). This being so, it follows that all other portions of the opinion which originate from that premise, are likewise erroneous and should be reversed.

Preliminary Statement as to Other Questions Presented.

Were your petitioner to be guided by the statements appearing towards the end of the opinion rendered by the Circuit Court of Appeals in deciding her Petition for Rehearing (R. 68) your petitioner would be tempted, due to lack of time, to limit this brief and argument to the question hereinbefore presented and to one or two others which, being of a jurisdictional nature, may be properly raised at any stage of the proceedings. Nevertheless, your petitioner

is under the impression that in stating in its said opinion (R. 68) that it has not gone into the other questions which would establish that your petitioner is not a farmer because it is believed that "the applicable definition is the new one found in the Chandler Act", the Circuit Court of Appeals overlooked the fact that at least most, if not all of the other features on which it bases those conclusions, were covered in the opinion rendered on January 10, 1940 (R. 53).

In view of this uncertainty, your petitioner shall proceed to discuss in this brief the other questions raised through the petition, so that, in case the writ of certiorari shall be granted, your petitioner may be in a position to appeal to the discretion of this court to have all the questions presented definitely disposed of. Otherwise, her penury and other unsurmountable obstacles might make it impossible for your petitioner to ever place such other questions before this court.

Second Question Presented.

2.

The Question as to the Applicable Definition of "Farmer" Having Been Erroneously Decided and Your Petitioner Qualifying as a Farmer Under Section 75 (r), All Legal Proceedings Initiated or Maintained Against Your Petitioner After the Filing of the Petition Under Said Section 75 Should Be Declared to Be Null and Void and of No Legal Consequence Whatsoever.

As stated on page 11 of the petition under this point, your petitioner bases her contention on the mandatory and self-executing stay provisions of subsections (o) and (p) of Section 75. Also on the provisions of subsection (n) of said Section.

Your petitioner not having been able to bring before this court a complete record of all the proceedings thus illegally

initiated or maintained, she must necessarily limit this prayer to the sale in execution of certain pledges held by a Special Master on October 13, 1938 and the order of confirmation thereof entered by the District Court at a later date as well as the order approving the deed of conveyance subsequently entered.

As stated at the beginning of the opinion pertaining to Appeal No. 3487, your petitioner filed in the District Court her petition for composition or extension under Section 75 of the Bankruptcy Act "one hour before the foreclosure sale pursuant to said decree." Under the circumstances and in view of the jurisprudence established in the premises by this Court in the case of *Kalb et al* v. *Feurstein et al.* and *Kalb* v. *Luce et al.*, which cases bear Nos. 120 and 121 before this Court, it seems altogether unnecessary to enter into protracted argument relative to the uncontrovertible fact that said sale in execution thus illegally held, as well as the order confirming said sale and the order approving the deed of conveyance are null and void and of no legal consequence since the District Court, sitting as a court of equity lacked jurisdiction to effect said sale or to enter the orders referred to. As stated in the opinion of the District Court (R. 19) "the fact that a judge of a federal court sitting in equity could protect the rights of all the parties as well as if he were sitting in bankruptcy could not affect the jurisdiction of the Bankruptcy Court upon the filing of a petition by a farm debtor under Section 75 of the Act. (See *Naylor* v. *Cantley* 96 F. (2d) 761)".

Third Question Presented.

3.

The Decision of the Circuit Court of Appeals to the Effect That Your Petitioner Is Not a "Farmer" Because of Her Poultry Business Is Clearly Erroneous.

Your petitioner believes to have sufficiently covered this point on pages 11 and 12 of the petition to which this brief refers and, for the time being, respectfully submits the question on the basis of those statements.

Fourth Question Presented.

4.

Sufficient Debts Were Shown to Justify Proceedings Under Section 75, Irrespective of the Debts of the Agricultural Pursuits of Your Petitioner and Other Joint Proprietors ("Comuneros") in the Island of Vieques.

To what has already been stated over the subject it seems in order to add that the proof of debt filed by The National City Bank of New York (R. 5) refers to a judgment recovered by said Bank against your petitioner in the sums of $2,208.13 and $14,520.22 with interest on said sums from May 27, 1931 and from June 3, 1931, respectively, at the rate of eight per cent per annum.

Your petitioner shall hereinafter establish that under our law regulating the subject of joint proprietorship ("Comunidad de Bienes") all the debts incurred by the agricultural enterprise in Vieques were chargeable to her personally, according to her undivided interest in said "Comunidad de Bienes" which, as shall be also shown, had lapsed prior to the filing of the petition under Section 75, as far as the *contractual* "Comunidad de Bienes" was concerned.

Fifth, Sixth and Seventh Questions Presented.

5, 6 and 7.

Your Petitioner Also Qualified as a Farmer Because the Principal Part of Her Income Was Derived from One or More of the Farming Operations Listed in Section 75 (r).

These three points being interrelated, your petitioner shall, for brevity's sake, proceed to treat them together, for which procedure she prays the indulgence of this Court.

Your petitioner being much pressed for time, she must, at least for the time being, submit these questions on the basis of the statements incorporated on pages 13 to 16, inclusive, of the petition to which this brief refers and elsewhere in this brief.

Eighth Question Presented.

8.

A Person Qualifies As a Farmer Under Section 75 (r) Irrespective of Which of the Farming Operations in Which Such Person Is Engaged Produces the Principal Part of His or Her Income.

For brevity's sake, your petitioner begs leave to reproduce at this point the statements incorporated on pages 16 and 17 of the petition to which this brief refers.

Your petitioner is satisfied that the legal proposition established in that part of the opinion transcribed on pages 16 and 17 of the petition, to the effect that even though a party qualifies as farmer, the principal part of his or her income must also originate from that particular operation and not from any other of the farming operations mentioned in Section 75 (r), will find no support in this court.

It seems in order to point out that the facts set forth in the opinion, when viewed in their true light, show that while your petitioner received $20,000.00 from benefit payments, in 1937, (thus making her a "farmer-producer") that income accrued "on account of the 1935 sugar crop" while the $600.00 per year income received by your petitioner from her poultry business accrued and was received during the years 1937 and 1938.

The hearing before the District Court on the Motion for Dismissal was had on December 27, 1938. In the course of that hearing your petitioner testified that she had been receiving profits of $50.00 or $60.00 per month from her

poultry business since about a year and a half prior to that date.

The fact that your petitioner should have been deriving her principal income from the growing of sugarcane, up to the year 1935, that her income from that source should have been terminated because of the receivership, during the year 1936 and that during the years 1937 and 1938, her principal income was derived from the production of poultry and poultry products in their unmanufactured state rather than militate against your petitioner serves to establish more firmly the ominous fact that the roots of her income have gone directly into the soil. This is specially so in view of the fact that it was not established that your petitioner received an income from any other source during those years.

As said by this Court in the *Beach* case repeatedly cited, "A farmer remains a farmer, just as a lawyer remains a lawyer, though the return of his investments, while not enough to keep him going, are larger, none the less, than the profits of his labor."

Before closing on this question, it seems in order to point out also that in the *Beach* case, while the farm debtor was held to have been occupied *principally* in producing poultry and eggs, having about 50 chickens at the time of the trial, "the reversal went upon the ground that the principal income of the debtor was derived from farming operations, if rents from the farm tenants ($2,200) were included in the reckoning, as the court held that they should be."

In affirming the reversal, this Court said:

> "The picture, however, is distorted if Beach is looked upon a landlord with rentals unrelated to his primary vocation. His rentals like his labor smacked of the soil, and made him not less, but more a farmer than he would have been without them."

Ninth Question Presented.

9.

Your Petitioner Qualified As a Farmer Both As Regards Her Poultry Business and Her Agricultural Pursuits in the Island of Vieques.

This question, your petitioner believes, has been sufficiently covered in previous argument.

Therefore, your petitioner shall, for the time being, submit it, on the strength of what has been hereinbefore set forth to uphold same.

Tenth Question Presented.

10.

The Circuit Court of Appeals Was Probably Wrong in Refusing to Reverse the Decision and Decree It Being that Issue Was Never Legally Joined on the Question As to Whether Your Petitioner Qualified or Not As a Farmer Under Section 75 (r).

(a) The motion for dismissal which resulted in the decree of dismissal complained of, affirmed by the appellate court, was never verified under oath, (R. 8) although the issue as to lack of verification was seasonably raised by your petitioner in her answer. (R. 11.)

(b) The issue raised by the said Motion for Dismissal, which resulted in the Decree of Dismissal complained of affirmed by the appellate court, not appearing from the record of the proceedings, such issues could not be raised through motion or petition, said procedure being altogether inadequate and contrary to law.

> "Neither party has the right, however, without pleading at the proper time and in the proper way, to introduce evidence, the sole purpose of which is to make

out a case for dismissal." Hughes Fed. Prac. Jurisdiction and Procedure, Sect. 3809, p. 348.

Sullivan *v.* Penn. Mut. Life Ins. Co., 106 F. (2d) 560 Averments of facts in amended bill were admitted by motion to dismiss.

"The question of jurisdiction may be considered on Motion to dismiss, although a plea to the jurisdiction is a better practice."

Sitenoth *v.* Central Stock, 99, P. 1.

But in case of motion to dismiss the defect must appear from the record.

Walker *v.* Flint, 7 F. 435.

Note from Cyclopedia of Fed. Proc. section 146 p. 723, note 94—(1937 Cumulative Supp.)

Standard Stoker Co., Inc. *v.* Loiver et al. 46 F. (2d) 678.

"In reply to complainant's other argument that, since on a motion to dismiss, the averments of the bill must be taken as admitted, Ketchpel did not retain any interest in the alleged invention and application for patent, and therefore a decree against Lower could not affect Ketchpel, it is sufficient to point out that the effect of such motion is equivalent to that of a demurrer, and that only allegations of fact not conclusions of law are to be taken as true. Scott *v.* Empire Land Co. (D. C. 5 F. (2d) 873.

Amalgamated Royalty Oil Corp. *v.* Hemme (C. C. A.) 282 F. 750;

Consolidation Coal Co. *v.* Western Maryland Rwy. Co., 44 F. (2d) 595.

In re Storey, 9 F. Supp. 858.

"The question (as to 'farmer') is one of fact and can only be decided upon a hearing had either before the court or by reference to a master." (Parenthesis supplied.)

"Motion to dismiss reaches only the defects on the face of petition." Matter of Syracuse Stutz Co. Inc. (C. C. A. 2nd Cir.) 65 F. (2d) 914; Blue Valley Creamery Co. *vs.* Stone (C. C. A. 3rd. Cir.) 80 F. (2d) 483.

Page 659. Simkins Fed. Pract., 1934 Ed. "The motion to dismiss admits the allegations of the bill and is treated as a demurrer under the old rules."

(b) Such procedure, once the issue was seasonably raised, contravenes the express provisions of Section 18 (c) of the Bankruptcy Act, as seasonably alleged by your petitioner in her answer (R. 12).

"In re Simmonson et. al. 902 F. 905:

"The bankruptcy act certainly requires that all pleadings setting up matters of fact shall be verified under oath, and it may be assumed that the petition is a pleading, within the meaning of the act" • • •

"The defendant in such case is, at his option, entitled to have all the requirements of law and the rules conformed to. Those requirements are made for his benefit. They afford him a shield and he can, if he desires, check the progress of the proceedings by insisting upon compliance with them" • • •

"If the objection to the form of verification had been seasonably made, no doubt it would have prevailed, in which event an opportunity to secure proper verification would have been allowed" • • •

"But in case the form is not literally followed, and in case the directory provisions of the act are not literally pursued, a defendant may avail himself of the defect" • • •

Please see: *Hunt* v. *Pooke*, S. N. B. R. 161; Fed. Cas. No. 6896; In re Butterfield, 6 N. B. R. 257; and *Moore* v. *Harley*, 4 N. B. R. 71, Fed. Ca. No. 9, 764.

Green River Deposit Bank et al. v. *Craig et al.* 110 F. 137.

"The court is of opinion that the objection urged is not, in a proper sense, jurisdictional, though a failure to make the verification required by the general rules

in bankruptcy and by law might, upon the defendant's objection, result in checking the progress of the litigation until the verification was properly made." In re Simonson (D. C.) 92 Fe. 904, 1 Am. Bankr. Rep. 197.

E. H. Godshalk v. *Sterling et al.* (C. C. A., 3rd, 1904) 129 F. 580, 582.

> "No objection seems to have been taken in the court below to the jurat, and it is too late to make such objection upon the hearing in this court upon this petition for review, even if the objection had any substantial basis. We do not see, however, that the jurat is open to objection."

This appellant respectfully submits the following fact in connection with the error urged under this point:

(a) Neither the "Petition of The Bank of Nova Scotia" nor the "Motion for Dismissal" (R. 7 *et seq.*) have been verified under oath, as required by Section 18(c) of the Bankruptcy Act. (R. 9).

Independent defenses No. 9 and 10, incorporated in this appellant's answer to said "Motion for Dismissal," read as follows in her said answer:

> "9.—For a ninth and independent defense, that the allegation made by The Bank of Nova Scotia to the effect that Respondent is not a farmer is not sufficient to join issue or that jurisdictional question in view of the fact that respondent filed her original petition herein verified under oath and that same was promptly approved by the Hon. Judge of this court, while the motion to which this answer and opposition refers has not been verified under oath. (R. 11).
>
> "10.—For a tenth and independent, defense, that the motion filed herein by said The Bank of Nova Scotia and to which this answer and opposition refers may not be passed upon by this Hon. Court, it being that same contravenes the provisions of Section 18 (c) of

the Bankruptcy Act requiring that all pleadings setting up matters of fact shall be verified under oath". (R. 12).

In addition to the foregoing in answering to the merits "without waiver of any of the defenses hereinbefore interposed, (R. 12) this appellant further alleges as follows:

> "Respondent further alleges that having filed her original petition verified under oath under Section 75 (a) to (r), in which petition all the jurisdictional facts appear and said petition having been promptly approved by the Hon. Judge of this court, said The Bank of Nova Scotia may not overcome or even challenge her qualifications as a farmer through allegations couched in the precise language of the statute, particularly when the motion in which said allegations have been incorporated has not been verified under oath." (R. 14-15).

The answer herebefore refetrred to, in which said allegations appear, was filed since December 12, 1938 (R. 9) verified on personal knowledge and under oath (R. 17) and copy thereof was duly served on appellee herein (R. 17).

Eleventh and Twelfth Questions Presented.

11 and 12.

The Liability of Your Petitioner as a Member of the Defunct Contractual "Comunidad" Is not Secondary but Primary, there Being Nothing in the Law Which Prevents a Coproprietor or "Condomine" in a "Comunidad de Bienes" to File Under Section 75 of the Bankruptcy Act.

Civil Code of Puerto Rico (1930 Ed.):

> "Section 333.—(Section 406, Civil Code of 1902, as amended by Act No. 15, 1916 page 48). Each one of the part-owners shall have the absolute ownership of his part and that of the fruits and profits belonging thereto,

and he may, therefore, sell, assign or mortgage the same, and even substitute another person in the enjoyment thereof, or lease such part, unless personal rights are involved. But the effect of the alienation or mortgage in relation to the part-owners shall be limited to the shares which may be alloted to them in the division upon the termination of the common ownership, and the effect of the lease shall be to confer on the lessee during the term of the contract, the powers of the part-owner in regard to the administration and better enjoyment of the common property.

"Section 334.—No part-owner shall be obliged to remain a part to the common ownership. Each of them may, at any time, demand the division of the thing held in common."

Since the airmail closes shortly, it is altogether impossible, for the time being, to argue this question extensively.

Thirteenth Question Presented.

13.

The Appellate Court was Probably Wrong in Refusing to Reverse that Part of the Decision and Decree of the District Court Which Requires Your Petitioner to Pay Costs Since When a Petition is Dismissed Exclusively on Jurisdictional Grounds, the Court may not Decree Costs.

"When a bill is dismissed for want of jurisdiction, the court cannot decree costs." Simkins Fed. Prac., 1934 Rev. Ed., par. 818, p. 772.

The following cases definitely confirm that rule of law:

Citizens Bank v. *Cannon*, 164 U. S. 324, 41 L. Ed. 453, 17 S. Ct. 89. See *Rucker* v. *Wheeler*, 127 U. S. 92, 93 L. Ed. 105, 8 S. Ct. 1142; *Hornthall* v. *The Collector* (*Hornthall* v. *Keary*) 9 Wall. 566, 567, 19 L. Ed. 562. See *Westfield* v. *North Carolina Min. Co.*, 100 C. C. A. 552, 177 Fed. 132; *Phoenix & Buiies Gold Min. Co.* v. *Winstead*, 226 Fed. 563.

Your petitioner respectfully prays this Court to reverse the decision and decree of the Circuit Court of Appeals relative to said appeal No. 3487 and to remand the case to the District Court of the United States for Puerto Rico, directing said District Court to set aside and vacate all legal proceedings initiated or maintained against your petitioner after she filed under Section 75 of the Bankruptcy Act and to reinstate your petitioner's farmer-debtor proceedings so that same may be continued pursuant to law and the rules for the case made and provided.

Respectfully submitted,

F. B. FORNARIS,
Counsel for Petitioner.

Ponce, P. R., May 18, 1940.